

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

TYLER JEROME SWAIN,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 16-2008-JDT-dkv
	)	
SAVE A LOT CORPORATION, ET AL.,	)	
	)	
Defendants.	)	

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ORDER ADOPTING REPORT AND RECOMMENDATION FOR DISMISSAL,  
CERTIFYING AN APPEAL WOULD NOT BE TAKEN IN GOOD FAITH  
AND DENYING LEAVE TO APPEAL *IN FORMA PAUPERIS*

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Plaintiff Tyler Jerome Swain, a resident of Memphis, Tennessee, filed a *pro se* complaint pursuant to 42 U.S.C. § 1983 on January 4, 2016, accompanied by a motion to proceed *in forma pauperis*. (ECF Nos. 1 & 2.) On January 11, 2016, U.S. Magistrate Judge Diane K. Vescovo granted leave to proceed *in forma pauperis* and issued a Report and Recommendation (“R&R”) in which she recommended dismissing the case *sua sponte*. (ECF No. 5.) Objections to the R&R were due on or before January 28, 2016. *See* Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d). However, Plaintiff has filed no objections.

Plaintiff sued Save A Lot Corporation, Corporate Security, and Robert Sims, alleging that a security guard at a Save A Lot store refused to let him use an electronic cart even though he was disabled and also threatened to hit him. He alleges that he was targeted because he is gay. In the R&R, Magistrate Judge Vescovo determined that Plaintiff’s

complaint did not state a claim under 42 U.S.C. § 1983 because he did not allege that the Defendants acted under color of state law. The Court finds no error in that conclusion. Therefore, the Court hereby ADOPTS the R&R and DISMISSES this case for failure to state a claim on which relief may be granted, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

The Court must also consider whether Plaintiff should be allowed to appeal this decision *in forma pauperis*, should he seek to do so. Pursuant to the Federal Rules of Appellate Procedure, a non-prisoner desiring to proceed on appeal *in forma pauperis* must obtain pauper status under Federal Rule of Appellate Procedure 24(a). *See Callihan v. Schneider*, 178 F.3d 800, 803-04 (6th Cir. 1999). Rule 24(a) provides that if a party seeks pauper status on appeal, he must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the party must file a motion to proceed *in forma pauperis* in the Court of Appeals. Fed. R. App. P. 24(a)(4)-(5).

The good faith standard is an objective one. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). The test for whether an appeal is taken in good faith is whether the litigant seeks appellate review of any issue that is not frivolous. *Id.* The same considerations that lead the Court to dismiss this case for failure to state a claim also compel the conclusion that an appeal would not be taken in good faith.

It is CERTIFIED, pursuant to Federal Rule of Appellate Procedure 24(a), that any appeal in this matter by Plaintiff is not taken in good faith. Leave to appeal *in forma*

*pauperis* is, therefore, DENIED. Accordingly, if Plaintiff files a notice of appeal, he must also pay the full \$505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals.

The Clerk is directed to prepare a judgment.

IT IS SO ORDERED.

s/ **James D. Todd**  
JAMES D. TODD  
UNITED STATES DISTRICT JUDGE